

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1740

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VICTOR DANIEL DELGADO-GUERRERO  
and RODOLFO TENORIO HERNANDEZ,

Defendants-Appellants.

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Appeal from the United States District Court for the  
Northern District of Texas  
(4:93-CR-32)

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(April 17, 1995)

Before GOLDBERG,\* JOLLY, and WIENER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:\*\*

Alerted by the manager of a Laredo, Texas shipping company,  
federal agents intercepted boxes containing seventy-nine kilograms  
of cocaine that were destined for a Fort Worth address, replaced

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\*Judge Irving L. Goldberg was a member of this panel when  
counsel presented arguments to the court, but he died before the  
opinion was written and circulated. The case is therefore being  
decided by a quorum. 28 U.S.C. § 46(d).

\*\*Local Rule 47.5 provides: "The publication of opinions that  
have no precedential value and merely decide particular cases on  
the basis of well-settled principles of law imposes needless  
expense on the public and burdens on the legal profession."  
Pursuant to that Rule, the court has determined that this opinion  
should not be published.

all but three kilograms with telephone books, resealed the boxes, and made a controlled delivery. After they accepted delivery of the boxes and cocaine, the defendant-appellants Rodolfo Tenorio Hernandez and Victor Daniel Delgado-Guerrero were arrested, indicted, and ultimately convicted by a jury of the substantive offense of possessing cocaine with the intent to distribute it and conspiring to commit the substantive offense. Both appeal their convictions and sentences. Finding no reversible error, we affirm.

I

Tenorio Hernandez challenges the sufficiency of the evidence. He also contends that the district court erred in denying his motion to suppress the evidence and in refusing his request for a jury instruction. He argues further that the district court erred in basing his sentence upon all seventy-nine kilograms that were shipped instead of the three kilograms that were delivered to him. In his brief, Delgado-Guerrero challenges only the sufficiency of the evidence to support his convictions, but he incorporates by reference Tenorio Hernandez's other arguments. Because the arguments of the defendants are so closely related, we will deal with them together, when appropriate.

A

We consider first whether the evidence was sufficient to support the convictions. The evidence reflects that the events that are the basis for the charges in this case began in Laredo, Texas, and ended with the arrest of the defendants in Fort Worth.

The terminal manager of a Laredo shipping company contacted a federal customs agent about three boxes that were addressed for delivery to a person named Fred Reyna at a Fort Worth address. The manager had become suspicious because the boxes identified the shipper as a fictitious company that was the subject of an ongoing narcotics investigation. Customs agents inspected the boxes, called for a drug-sniffing dog and, after the dog alerted to all three boxes, obtained warrants to search them. Inside each box, the agents found a padlocked duffel bag that contained packages of cocaine. After notifying agents in Fort Worth, the agents resealed the boxes and flew them to Fort Worth to complete the delivery. In Fort Worth, the agents obtained a uniform and truck from the shipping company, replaced the cocaine with telephone books (but left one package of cocaine in each duffel bag) and resealed the boxes. An agent disguised as a deliveryman attempted to deliver the boxes to the address on the shipping label, but no one was home. The deliveryman tried again later that same day, and again no one was home, but he was advised by radio that someone had just attempted to pick up the boxes from the shipper's Dallas location. A short while later, the defendants arrived at the address and, after taking delivery of the boxes from the disguised agent, were arrested. Additional evidence will be referred to in succeeding sections, as relevant.

(1)

As an initial matter, we reject Tenorio Hernandez's challenge to the sufficiency of the evidence because it is based on a misapprehension of the definition of the offense with which he was charged and convicted. He admits that the evidence was sufficient to convict him with respect to the three kilograms that he and Delgado-Guerrero actually received,<sup>1</sup> but urges that the evidence was insufficient to convict him of the offenses with respect to seventy-nine kilograms of cocaine (the amount shipped). It is well-settled, however, that quantity is not an element of the offenses charged but is relevant only in determining sentences. United States v. Morgan, 835 F.2d 79, 81 (5th Cir. 1987). Accordingly, we find that Tenorio's challenge to the sufficiency of the evidence to support his convictions is meritless.<sup>2</sup>

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<sup>1</sup>In his brief, Tenorio Hernandez states: "Appellant denies that the government proved the case against him as to 79 kilos, albeit the evidence will sustain a conviction as to the three kilos, and there was not sufficient evidence to prove that (1) defendant had knowledge that 79 kilograms was involved (2) that he possessed 79 kilograms of cocaine and (3) that he intended to distribute 79 kilograms of cocaine, although there was sufficient evidence as to the three kilograms." (Emphasis added.) As a consequence, Tenorio Hernandez urges, "The conviction and sentence should be revised as to the 79 kilos and modified at best to conform to the three kilos."

<sup>2</sup>For essentially the same reason, we reject Tenorio Hernandez's argument that the district court committed reversible error in refusing his request for a jury instruction that would permit the jury to make a finding of fact as to the amount of cocaine for which he was being convicted. The specific amount of cocaine is not an essential element of the offenses charged. As a consequence, it is not a matter for the jury, and the district court did not commit reversible error in refusing the requested

(2)

Turning to Delgado-Guerrero, he argues that the evidence adduced at trial establishes only that he had accompanied Tenorio Hernandez from Mexico; that he was present when the boxes were delivered and that he helped to handle the boxes; that he tipped the agent who posed as the deliveryman; and that his briefcase contained the vehicle registration for a pickup truck with a false compartment that was not easily detectable. In addition, Delgado-Guerrero admits that he gave an inconsistent statement to agents concerning how he traveled to Fort Worth, but points to his immediate, unprompted correction as an indication that it was an honest mistake. In short, Delgado-Guerrero contends that the evidence establishes nothing more than his association with Tenorio Hernandez and his presence at the delivery. Because the evidence does not establish that Delgado knew that the boxes contained cocaine, he argues, his conviction must be reversed.

We disagree. It is not required that Delgado-Guerrero knew that these particular boxes actually contained cocaine. Instead, we will reverse his conviction only if we find that the government has not produced evidence that would permit a rational trier of fact, employing its common knowledge and common sense, to find from the evidence that the government established beyond a reasonable doubt that (1) an agreement to violate the narcotics laws existed

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instruction.

between Delgado-Guerrero and another persons, (2) Delgado-Guerrero knew of the conspiracy and intentionally joined it, and (3) Delgado-Guerrero participated voluntarily in the conspiracy. United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989) We review the evidence and draw all reasonable inferences from the evidence--including credibility choices--in the light most favorable to upholding the verdict. Id.

Having thoroughly reviewed the record and considered the arguments of the parties, we hold that the government introduced evidence upon which a reasonable trier of fact could convict Delgado-Guerrero. This case is not comparable to United States v. Sacerio, in which this panel held that the evidence was insufficient to support the convictions of either of the two appealing defendants because, although the circumstances were suspicious, no evidence, either circumstantial or direct, showed that either defendant knew that a rental car contained drugs. 952 F.2d 860, 864 (5th Cir. 1992). This case reflects additional evidence--specifically, the evidence relating to the pickup truck and the fact that the defendants traveled to Dallas to pick up the boxes--upon which a trier of fact might reasonably infer Delgado-Guerrero's knowing and willing participation in a drug conspiracy.

First, the government introduced evidence that Delgado-Guerrero's briefcase contained the registration for a pickup truck parked outside the residence. The registration indicates the truck is registered to a Laredo resident. A rational trier of fact would

be entitled to infer from this evidence a connection between Delgado-Guerrero and the truck.

The evidence indicates also that the pickup truck had a highly sophisticated hidden compartment for concealing drugs. Delgado-Guerrero argues that, because the compartment was not detectable to the naked eye, it is not probative of his knowledge or knowing participation in the conspiracy. The implication of his argument is that, unless the compartment was obvious or unless the government can prove he knew of the compartment, he cannot be charged with knowledge of it. We reject this argument. The evidence indicates that the pickup truck was registered in someone else's name. The jury was entitled to use its common sense and to infer that the truck was specifically designed for drug trafficking and that Delgado-Guerrero would not have such a truck unless he intended to use it in furtherance of the conspiracy.

In addition, testimony at trial revealed that Delgado-Guerrero gave inconsistent statements concerning how he traveled to Fort Worth. Initially, he told the agents that he had traveled to Fort Worth by bus, but then immediately changed his story to say that he and Tenorio Hernandez had driven together in a car. The jury might have chosen to disbelieve both stories, however, and conclude--justifiably, in the light of the evidence--that Delgado-Guerrero and Tenorio Hernandez, traveling together, had brought the pickup truck from Laredo to Fort Worth for further transport of the cocaine.

Finally, the evidence reflects that Delgado-Guerrero and Tenorio Hernandez traveled together from Fort Worth to Dallas early on the day of their arrest to attempt to pick up the boxes from the shipper. The jury was entitled to infer from this fact that Delgado-Guerrero and Tenorio Hernandez knowingly and voluntarily acted in contravention of the federal drug laws.

In sum, in addition to the facts that he was present at the drug delivery, that he helped in the unloading of the boxes that contained the cocaine, and that he tipped the deliveryman, the jury also had before it the presence of the specially modified drug-concealing pickup truck at the delivery scene, together with the truck's connection with Laredo and the fact that the registration for the truck was found in Delgado-Guerrero's briefcase; and the additional fact that Delgado-Guerrero and Tenorio Hernandez traveled together to Dallas in an attempt to pick up the boxes from the shipper. This evidence provides ample basis for a rational trier of fact to conclude beyond a reasonable doubt that Delgado-Guerrero was a knowing and voluntary participant in the conspiracy.

(3)

For the above reasons, we find that the evidence was sufficient to support the convictions of the defendants.

B

The defendants next contend that the district court committed reversible error when it denied Tenorio Hernandez's motion for an evidentiary hearing and denied his motion to suppress certain



evidence. This argument proceeds on the premise that the warrant supporting the search of the boxes in Laredo was defective and that the search therefore violated his Fourth Amendment rights. Our precedent forecloses the possibility that the defendants have standing to make this argument, however: in United States v. Pierce, we held that a defendant who is neither the sender nor the addressee, nor the intended recipient, nor has asserted an ownership interest in a package may contest a search of the package. 959 F.2d 1297, 1303 (5th Cir.), cert. denied, \_\_ U.S. \_\_, 113 S.Ct. 621 (1992). This case presents essentially the same situation. Following Pierce, we reject this argument.

C

Finally, the defendants challenge their sentences, contending that they are entitled to be sentenced with respect to the three kilograms of cocaine that were actually delivered, not the seventy-nine that were shipped. We disagree. The sentencing guidelines require sentencing based on amounts the defendants knew or should reasonably have foreseen. United States v. Puma, 937 F.2d 151, 160 (5th Cir. 1991), cert. denied, 502 U.S. 1092 (1992). But for the agents replacing seventy-six of the seventy-nine kilograms of cocaine with telephone books, the defendants would have received, as a result of their conspiracy, seventy-nine kilograms of cocaine. Seventy-nine kilograms was therefore a foreseeable amount, and the defendants were properly sentenced.

II

We hold that the evidence is sufficient to support the convictions of Tenorio Hernandez and Delgado-Guerrero, that they were properly sentenced, and that the district court committed no reversible error in this case. The judgment of the district court is therefore

A F F I R M E D.